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No. 740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

STANDARD FRUIT AND STEAMSHIP COMPANY,
Appellant

v.

UNITED FRUIT COMPANY
AND
UNITED STATES OF AMERICA,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS OR TO AFFIRM

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Pursuant to Rule 16 of the rules of this Court appellee United Fruit Company ("United") moves to dismiss the appeal on the ground that it is not within the jurisdiction of this Court or, in the alternative, to affirm the order of the District Court on the ground

that it is manifest that the question presented by appellant is so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

For a statement of the background of this litigation and of the proceedings in the District Court we respectfully refer the Court to pages 1-9 of United's brief in opposition to the petition of appellee Standard Fruit and Steamship Company ("Standard") for a writ of mandamus (No. 788 Misc. October Term, 1968), which was denied by this Court on December 9, 1968.

ARGUMENT

I

The order of the District Court lacks the requisite finality and hence is not appealable under 15 U.S.C. § 29. The order denied a motion by Standard for leave to inspect detailed programs and progress reports relating to the proposed competitive activities of a new company that United is required to organize and to divest as an independent entity by the terms of a consent judgment entered in a civil antitrust case brought by the United States against United.[1] The denial was expressly made without prejudice to renewal of the motion thereafter. The order is thus interlocutory because it is not a final adjudication of the right that Standard asserts.

Standard contends that it is entitled to advance information about the competitive plans and programs of the new company (Sovereign Fruit Company, herein-

[1] Standard is not a party to this proceeding and has not sought to intervene.

after "Sovereign") so that it may protect itself against the competitive activities of Sovereign after that company is divested by United and begins independent operations.[2] Although United does not concede that any circumstances will arise that would entitle Standard as a matter of right to inspect the confidential plans and programs of Sovereign relating to its proposed competitive activity, it recognizes that the order sought to be appealed does not finally adjudicate the asserted right of Standard to see those plans and programs prior to Sovereign's divestiture and independent operation. The last clause of the order states that the purposes of the Final Judgment and the public interest will not "now" be served by granting the motion, thus explicitly recognizing that at some later stage in the divestiture proceedings the District Court may, upon application by Standard, reconsider the present denial.[3]

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[2] In the court below Standard asserted that it "has a vital interest" in the plan for divestiture because "the final judgment herein contemplates that the New Company would provide competition against Standard as well as against defendant". (Motion, p. 2). And in this Court in its Jurisdictional Statement Standard asserts that the question presented is whether the plans and programs of Sovereign should be sealed "from access by the defendant's smaller competitors whom the decree was presumably intended to protect and benefit." (P. 4).

[3] This is recognized by the United States in its memorandum filed in the United States Court of Appeals for the Fifth Circuit supporting affirmance of the District Court's order (page 7):

> "The court's ruling, of course, represents only its view of the situation at the present time. It denied Standard Fruit's motion without prejudice to the right of Standard or of the government to make the same or a similar motion in the future. Thus should the facts warrant it, the way to necessary disclosure remains open."

Divestiture and independent operation are not now imminent. The divestiture proceeding is in only an intermediate state. United has filed the initial plan for compliance which was approved by the District Court on July 28, 1967. It has not yet filed the "detailed program showing shipping arrangements, terminal arrangements, liquid assets and other essential accessory assets that have been transferred or will be offered to the New Company prior to or contemporaneously with the distribution of its capital stock by defendant." This program need not and will not be filed by United until some time in 1969. Approval by the District Court will be required for this program. And after an order approving the program is entered it is contemplated that a period of time will elapse before the final step of divestiture occurs and independent operation by Sovereign begins. This final step will also require an order of approval by the District Court. Standard may apply either at the time of the approval of the detailed program or at the time that the final step of divestiture is submitted to the court for leave to inspect the proposed competitive plans and programs of Sovereign. In the meantime no interest of Standard can be injured because no independent competitive activity by Sovereign will occur.

Appellate review will be effective if granted at a later stage of the divestiture proceeding and no legitimate interest of Standard will be irrevocably lost if there is no appellate review at the present time. Thus the present order does not finally determine any claim of right "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the

whole case is adjudicated." See *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546.[4]

II

If it is assumed that the order is final and hence appealable under 15 U.S.C. § 29 it should be affirmed because the question presented is not sufficiently substantial to deserve plenary consideration by this Court.

In arguing that the question presented is substantial (Jurisdictional Statement, pp. 8-14) appellant repeats without change the arguments made in its Petition for Mandamus (pp. 9-14). We have responded to these arguments in United's Brief in Opposition to the Petition for Mandamus (pp. 9-14) and for that

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[4] The cases cited by Standard on page 2 of its Jurisdictional Statement involved orders essentially different from the order involved here. In Clark v. Williard, 292 U.S. 112, and Swift & Co. v. Compania Caribe, 339 U.S. 684, the judgments finally and irrevocably adjudicated asserted property rights of the appellant in circumstances in which appellate review was necessary to preserve those rights. In Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, the order by denying a petition for leave to intervene finally and irrevocably denied the exercise of a right to participate in the proceedings that had been specifically safeguarded by the terms of the consent decree entered in that case. Here Standard has not sought to intervene, and no right to participate in this proceeding was granted to Standard by the terms of the Final Judgment. In Cohen v. Beneficial Loan Corp. the order finally denied a motion that the plaintiff in a stockholders' derivative action be required, pursuant to a state statute, to give security for reasonable expenses of the defendant. The Court noted that unless the order were reviewed at the outset of the litigation the rights afforded by the state statute, if it were applicable, would be lost, probably irreparably. 337 U.S. at 546. The order in the instant case does not finally adjudicate any right of Standard and the asserted right will not be irrevocably lost if appellate review is deferred until a later stage of the proceeding.

reason we shall confine the discussion here to a brief supplementary comment.

The inherent authority of the District Court to enter an order protecting from disclosure the competitive plans and programs of Sovereign is established by decisions cited in the Brief in Opposition to the Petition for Mandamus (pp. 10-12) and is not seriously contested by Standard. It follows that the only question presented here is whether the District Court abused its discretion by refusing to give Standard access to these plans and programs. This issue turns upon the particular and peculiar facts involved. The consent decree required United to organize Sovereign, which will be smaller than either United or Standard, and to launch it as an independent competitor. Standard, whose operations and resources far exceed those of Sovereign, will be one of the principal competitors of the fledgling company. Standard seeks access to information that would enable it to impede and possibly to frustrate the competitive activities of Sovereign. Standard made no showing in the court below by way of affidavit or otherwise that access to Sovereign's plans and programs was necessary to enable Standard to compete or that failure to obtain this access would in any degree restrain or reduce competition.[5] Instead

[5] Standard's argument that it is entitled to see the plans and programs because one person has left its employment and joined the staff of Sovereign has been dealt with at pages 12-13 of our Brief in Opposition to Standard's Petition for Mandamus. It may be observed here that if Standard has any independent right to prevent persons from leaving its employment and joining the organization of Sovereign, it is free to assert that right against the persons involved or United or Sovereign in an independent proceeding in which Standard will have the full opportunity for discovery afforded by the Federal Rules of Civil Procedure. Any right of this kind is not affected in any way by the order of the District Court here involved.

Standard sought by general and abstract appeals to the public interest to obtain information to be used to promote its private ends. The court below correctly decided that the private interests of Standard had not been shown now to warrant a disclosure that might jeopardize the viability of Sovereign and thereby frustrate the statutory purposes that the consent judgment was designed to achieve.[6]

No substantial question is raised by Standard's insistence that the United States should have Standard's "expert assistance in evaluating the viability of United's plans for establishment of a new company". (Jurisdictional Statement, p. 11). The United States is in a better position than Standard to determine whether it requires assistance from Standard to carry out the purposes of the judgment. The United States has not sought review of the order denying Standard's application. On the contrary, in a memorandum in opposition to Standard's Petition for Mandamus the Solicitor General stated:

> "In addition, we submit that the issue presented —whether on the particular facts of this case the district court abused its discretion in refusing to vacate the protective order—is not of such great public importance as to warrant immediate review in this Court." (P. 4).

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[6] The District Judge, who was specially designated in 1956 to hear this case, has supervised all discovery, ruled on all motions, reviewed and entered the Final Judgment and considered and made all of the existing orders relating to the proposed divestiture. Because of his knowledge of the record and of conditions in the banana industry he was well qualified to determine whether advance disclosure of Sovereign's proposed competitive plans and programs would create problems for that company that might threaten accomplishment of the purposes of the Final Judgment.

And the memorandum filed on behalf of the United States on November 14, 1968 in the Court of Appeals for the Fifth Circuit in opposition to Standard's appeal stated:

> ". . . we conclude that the district court's order was a proper exercise of its discretion and that it should be affirmed." (P. 7).

In the face of these considered judgments by the law officers of the United States, Standard's attempt to justify its appeal by invoking considerations of the public interest does not deserve serious consideration.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or in the alternative the order entered below should be affirmed.

Respectfully submitted,

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